No. 4887.

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United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

J. W. Dunfee,

Appellant,

vs.

C. A. Terwilliger, on Behalf of Himself and All Other Stockholders of the Orleans Mining and Milling Company, a Corporation, Similarly Situated,

Appellee.

APPELLANT'S BRIEF.

AUGUSTUS TILDEN,
JOHN F. KUNZ,
Attorneys for Appellant.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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STATEMENT OF THE CASE.

This is an action by Terwilliger, as a stockholder of the Orleans Mining & Milling Co., to follow into Dunfee's hands and impress with a constructive trust money and stock realized by Dunfee from the sale of a mining lease on the Orleans Mine taken in his own name, but which, Terwilliger claims, Dunfee should have taken in the name of the Orleans Company.

At the outset Dunfee owned, admittedly in his own right, a lease on the Orleans Mine. He took Terwilliger in with him, and together they organized the Orleans Company to finance and operate the lease. Their agreement was put into writing providing in substance that in consideration of Dunfee's assigning the lease to a corporation to be formed, and of the equal division between Dunfee and Terwilliger of the promotion stock of such corporation, Terwilliger would raise $8000 by the sale of some of his shares, of which $3000 should go to Dunfee and $5000 into the treasury of the corporation. All of these things were immediately done, so that the contract became immediately wholly executed except as to one clause, which reads:

"It is further agreed that should it be deemed advisable after the full $8000 is raised to raise more money for development, the stock so sold shall be taken share for share from the holdings of J. W. Dunfee and C. A. Terwilliger respectively." [p. 6.]

The lease contained the usual terms requiring the performance of a certain number of shifts of work per month, etc. [p. 71.]

In November, 1918, the corporation, after a period of greater or less prosperity, ceased to function; no work was ever thereafter done by it upon the leased premises; it permitted the machinery, which belonged to the lessor and went with the lease, to be stolen, and allowed the timbering to fall into decay and the mine, which comprised several shafts and lateral workings, to fall into dilapidation. By expiration of the term of the

lease, and by an express declaration of forfeiture, the lease ceased to exist on May 31, or June 1, 1920.

On June 5, 1920, five days after the expiration of the company lease, Dunfee took a lease in his own name. After some considerable gophering around for ore he became discouraged and in October of the same year surrendered this second lease. About the first of the year 1921 the lessor offered him a third lease on more liberal royalty terms, but he refused to accept it on the ground that he was financially unable to perform the requisite sixty shifts per month. The lessor thereupon induced him to go upon the ground and explore it on his own time, with the understanding that if he uncovered commercial ore in justifiable quantity he could have a lease dated back to Jan. 1, 1921. After expense running into thousands of dollars, incurring of debt, and arduous personal toil, Dunfee, in March, 1921, made an important strike. He thereupon sought and obtained the lease involved in this action, dated back to Jan. 1, 1921, as agreed. In July of the same year he found a purchaser at $40,000 cash and 150,000 shares of stock of a corporation to be formed by the purchaser.

Terwilliger and his associates remained absolutely quiescent until Dunfee made the sale. They claim to have been in ignorance of his independent activities over the period from the expiration of the company lease, May 31, 1920, to the date of the strike, March, 1921; but admit that they did absolutely nothing to inform themselves, and, of course, that they did not warn Dunfee of their intention to claim the fruits of his enterprise if there were any, or offer in any way to assist

him. Immediately that the fact of sale became public, however, they, in the name of the corporation, served a written notice on the purchaser asserting title to the proceeds of the sale. The purchaser disregarded this notice, whereupon Terwilliger, after a further delay of some ten months, commenced this action, in April, 1922, repudiating the sale and demanding possession of the mine itself. During the trial his position was again reversed and he sought and obtained a judgment for the proceeds of the sale.

The evidence, without the slightest conflict, establishes to a moral certainty the following conclusions of fact:

1. *That Terwilliger early in the enterprise formed a determination to evade the clause in the pre-incorporation contract requiring him and Dunfee to contribute from their respective personal stockholdings for future financing, and brought about a premature cessation of mine operations, in order that the mine should not be too completely stripped of ore as to hinder stock sales, having expressly in view the sale of treasury shares.*

2. *That having brought about a cessation of mine operations, he began a course of pressure upon Dunfee to get him to agree to a modification of the clause calling for joint personal stock contributions.*

3. *That failing in this purpose, he purposely suffered the lease to expire, expecting that Dunfee would take a new lease in his own name, and intending to claim an interest with Dunfee should such new lease prove a success.*

(1) On August 30, 1917, Terwilliger was seeking a California permit to enable him to sell *treasury* stock [pp. 145-6]. He had then "no idea" of selling his own stock [p. 146]. He sold some 200 shares of *treasury* stock to one John Winkler [p. 147]. In August preceding the closing down of the mine he was frankly intending "to finance it with the 400,000 shares not sold"—the treasury shares. [p. 129.]

He testified:

Q. What was your anxiety to sell stock if you considered that the payment of eight thousand dollars absolved you from any further obligation from (to) the company? A. I didn't consider that, that I had no obligation whatever; I was interested in this property; I was fifty-fifty with Mr. Dunfee, and naturally I wanted to help finance it, and that was my idea for getting the permit to sell the stock and finance the property.

Q. Did you contemplate selling treasury stock? A. That is what I figured on at that time.

Q. You recall that this contract of yours provides that any future stock sales shall be made from your holdings and Mr. Dunfee's holdings, don't you? A. That never was discussed after we started in, that is in anywise that I remember; it is in the contract.

Q. The provision is as follows: (Reads provision.) You abandoned that idea, did you? A. At that time that never entered my head.

Q. Did you abandon that idea? A. That idea never entered my mind when when I wrote that letter. (Witness is referring to letter written in relation to procural of California permit to sell stock, in which he says, *inter alia*, "The principal thing right now is to be able to sell stock, so we can keep money in the treasury, as our funds will soon be exhausted." [p. 145.]

Q. You never had any idea then of selling your own promotion stock? A. At that time when I wrote that letter, no.

Q. You have been telling the court about the 400,000 shares that were in the treasury, by which the company could be carried along; your idea that that 400,000 shares could carry the company had to do with your abandonment of this provision that I have just read, had it? A. No, sir; I don't look at it that way at all.

Q. Were you operating under the theory that you would dispose of the treasury stock, or under the theory that you would operate under this contract? A. I was not manager of the property, and Mr. Dunfee had never submitted to me that he and I would sell that stock as it was agreed upon in the contract. [pp. 146-47.]

* * * * * * * * * *

Q. Now, Mr. Terwilliger, let us go back to where we started: You said you met Mr. Dunfee in Hornsilver, and he told you he was going to shut down the mine, and he then said, "Leave everything to me, I will make money for you all;" tell the court how he was going to make money for you all if he was going to shut the lease down? A. He never mentioned any of his preparations, or anything further than that after the war was over he and Judge (Edwards) and myself would get together and arrange some plan to finance the property.

Q. Then you knew when he said this to you, to wit, "Leave it all to me, I will make some money for you," that there was nothing in view whereby he was to make any money for you, did you not? A. I thought we would get together, and that we would finance the property again; we had plenty of stock, lots of stock never had been disposed of, the treasury had never been sold, to sell the stock and put a price on the property of

$250,000, and turn the money into the company. [pp. 105-6.]

Later, being shown the company's financial report, rendered on the date of cessation of operations, he explained:

"It shows the company was in debt $200, that the company had 400,000 shares of treasury stock, and the last share of treasury stock I sold I sold at 50¢ a share, and no attempt had ever been made to make disposition or give me an opportunity to associate myself with anyone to use a share of that treasury in financing this company." [p. 136.]

The learned judge below comments favorably on the tenor of Terwilliger's letter of September 30, 1918, demanding the closing down of the mine. This letter in part follows:

"Now would say in regard to this mine, it is my opinion and all of the stockholders here, that under the present war conditions we are only sacrificing every bit of the ore we are taking out of the mine in keeping it running and we are not in favor of your putting up your money in running the property and placing the company under obligations and being indebted to you. * * * It is my advice representing fifty per cent of the stock, that we close down without further delay or sacrificing any more ore or money. * * * We must remember that four of our stockholders who are in our company are fighting in France now, and you, Judge Edwards, myself and the French Company (the lessor) are in duty bound to protect them and to see that their investment, which they have entrusted to us, is absolutely bona fide." [Fol. 15.]

But the learned judge wholly overlooked the motive back of the letter, which Terwilliger divulged as follows:

Q. * * * You told Mr. Dunfee to shut down, didn't you? A. He had told me three or four months before that he intended to close down, then at the final —possibly, I know I wrote to him, and told him that my advice to him would be to close down the property immediately, because we were not realizing a dollar on it, and I thought the property could be financed much easier with lots of ore in sight than it would be to work the property out, you understand, and not have anything in sight.

Q. So your idea was that he should close down in order that there should be a lot of ore in sight? A. If we were going to finance it with the 400,000 shares not sold. [p. 129.]

(2) The purpose of the clause providing for personal contributions was obviously to keep the total outstanding shares down to the original 600,000. And this provision, since it entailed a sacrifice on the part of Terwilliger and Dunfee, was palpably intended for the protection of those whose purchases of stock from Terwilliger—his own friends—provided the original capital of $8,000; yet from the time that Terwilliger accomplished the closing down of the mine, the burden of every one of his letters to Dunfee is, Come to Los Angeles and agree upon a modification of the pre-incorporation clause.

Feb. 18, 1919, he wrote: "If you come down here we may be able to work out some intelligent method for financing the property." [p. 110.]

Apr. 9, 1919: "I want you to meet me in Los Angeles as soon as you can be there, so that definite plans may be made for continuing operation." [p. 113.]

Mar. 26, 1920, two months before the lease expired, Dunfee wrote Terwilliger as follows:

"In regard to Orleans if I can secure a 2½ years lease and option from Judge Edwards (attorney in fact for the lessor) "which I believe I can. Do you think you could take the old Co. and get the money by selling stock to work it. We start out on a new Basses I got wise to the stock game

"I have looked the state over and there a better chance on the Orleans than any thing I saw War times upset us Wire or write me what you are willing to try and do—or what you think could be done—the inducement are better now than ever before. We eventually get in our own mill * * *." [p. 84.]

Notwithstanding the imminence of the expiration of the lease, Terwilliger delayed his reply to this letter for thirty-six days, then, on May 2nd, wrote:

"Your letter of some time ago received and I have been away, hence delayed in replying to same. When will you be in Los Angeles to confer with me regarding this matter of the Orleans property. I would not attempt to do any business through the mail, as I consider it would be time wasted. I expect to be here from now on. Very glad to hear your health is so much improved."

But even more to the point is the following memorandum, initialed with Terwilliger's initials, written on the back of Dunfee's letter, to which Terwilliger's May 2 letter was a reply:

"Ansd. Mch. 30/20 and stated would not raise any money on the old line, and would not make any agreement about this matter by letter or wiring. Told him to come to Los Angeles and we would go into the matter in detail and come to some understanding for financing. C. T. A."

There was no further correspondence between the two.

(3) Terwilliger's suffering of the lease to expire was characterized by elaborate deliberation.

His attention was called to the following allegation in the bill of complaint: "Also, that he, the said Dunfee, was on very intimate terms with said French Company (the lessor), and particularly with the said E. Carter Edwards, who was the agent and attorney-in-fact for said French Company, and that because thereof, he, the said Dunfee, could and would obtain any renewal or extension of said lease, also option to purchase said mining claims, that might be *desired* by plaintiff, the defendant Dunfee, or the corporation to be formed;" and he admitted:

"I never at any time told Mr. Dunfee or ever expressed the desire to have the first lease extended after the lease shut down. I never had dictated to him about the lease."

Q. I am not asking you whether you dictated; you have used the word "desired" here; you say that he was to get an extension that was desired; now the lease shut down in November, 1918? A. Yes, sir.

Q. Tell the court when after that that you expressed a desire to have the lease extended. A. I can't say that I ever conferred with him.

Q. Can you say that you never did express that desire? A. I never made a demand on him about getting extensions at all.

Q. Now you say also that the extension was to be procured if the corporation desires; can you tell the court at any time after that lease shut down that the corporation expressed a desire for an extension of it? A. Never in writing, I don't think verbally we ever did.

Q. Take that paper again and I will read a little further down: "And wholly trusted and depended upon the said Dunfee, and believed and relied on his statements that he alone could obtain such extension or renewals and that he would obtain same after the use and benefit of said corporation *whenever deemed desirable or necessary.*" You add the word "necessary;" do you know of the corporation ever taking any action in which it declared it necessary that that lease be extended? A. No. [pp. 120-1.]

His complete paralysis of initiative was, moreover, in the face of a sharp warning from Dunfee. The latter, after stating that he had written two letters to Terwilliger in April, 1919, one of which had not been produced, testified:

"I did not retain a copy of that letter; wrote it just in longhand. I stated in effect we had to get to work on the Orleans property, as he knew we had to do sixty shifts by the last of May if we expected to hold the lease; that there was no money in the treasury, that we had to raise money, and I had paid up back bills, and the company was already indebted to me in the amount of $400.00. That is practically all that I remember of the letter. *I have since seen it in the possession of Mr. Atkinson after Atkinson became Mr. Terwilliger's attorney.* In it I was telling Mr. Terwilliger if he would

come up we would get a new lease, but we would have to go to work, and I haven't talked the terms with Judge Edwards, but just stated we would take a new lease, and for him to come up; and after I had talked the terms over with Edwards, he said he would give us a 2½ years' lease if Mr. Terwilliger would come up and go to work, but that we could not bluff any longer, we had to go to work. Then I notified Mr. Terwilliger of that in my March 26th letter. His answer to the March 26th letter, dated May 2, 1920, is the last communication I ever had from him." [p. 272.]

Counsel, after a search [p. 271], stated that they were unable to find the letter thus summarized by Dunfee. Atkinson was not produced. Terwilliger testified:

Q. Did you receive a letter from Mr. Dunfee in 1920, in which he said, "You know as well as I do we have to do sixty shifts a month?" A. I *don't remember* that letter.

Q. Well, did you or did you not receive such a letter? A. I *don't remember* of having received such a letter, where he said you know as well as I do we have to do sixty shifts a month; I *don't remember* of ever receiving that letter, I *don't think* I did. [p. 158.]

Always, while trying to force Dunfee to submit to a modification of the pre-incorporation agreement with respect to stock sales, he had in mind holding Dunfee to it in every other respect.

Q. You knew the lease could not run without money, didn't you? A. I suppose.

Q. You knew that if you and Dunfee and Edwards didn't get together and arrange for money, that the lease would not run, didn't you? A. Yes.

Q. What did you expect would happen to the lease,

that it would be continued indefinitely without any work being done on it? A. No, sir; I figured I had put my money in there, and that I had assurance from E. Carter Edwards, his final remark to me was, you go back to Imperial Valley and tell your stockholders not to worry, that their investment will be protected in every way; that was in 1918, about August 3 or 4, when we were leaving Hornsilver; that was my assurance from E. Carter Edwards, secretary of the company, and I naturally had faith in Mr. Dunfee and him, and supposed they were two of them, and I was alone, that they would come where the money was forthcoming when they wanted the money; they were there together before, and everything was fine, and I was treated with the utmost respect; after I put the money in, after I made the protest, after I had put $8000 in and I raised a protest I was insulted—

Q. Never mind, you have answered the question. To get back to the question I asked, how did you expect the lease to run without money? A. I didn't; and I expected to help finance that property, if they would come where the finances were; I considered it a waste of time to go to Goldfield to raise money, because I didn't consider it was there.

Q. Did you expect the lease to be indefinitely extended without any work? A. I didn't expect it to be indefinitely extended without any work, but I will tell you what I did expect.

Q. All right. A. *I expected whenever that property was in the name of J. W. Dunfee, that me and my stockholders stood fifty-fifty with J. W. Dunfee,* that was my direct understanding in this proposition, and the only understanding I ever had, and I never sold a share of stock to the stockholders without citing them to the fact that I was fifty-fifty with J. W. Dunfee; that was

my statement to them in detail, and that I would never be thrown out.

Q. Now listen to this question: You stated you knew the lease could not run without money, and you stated that you knew the lease could not run indefinitely without work; when did you expect that lease to cease? A. I expected, as I told you, to help finance that property?

Q. When did you expect the lease to cease? A. I expected at all times if Mr. Dunfee had anything to do with that property to be protected.

Q. Is not this the situation, Mr. Terwilliger, that you were simply holding Mr. Dunfee to any property that he might ever get on that Orleans ground, whether it was under this lease or any other instrument; that is your position, isn't it? A. My understanding with—

Q. Never mind; what was your position? A. I am going to tell you my position with Mr. Dunfee, if the court will allow. *My position with Mr. Dunfee was, and my understanding with him, that as soon as he ever got a lease or purchased an option or anything on that property, I was fifty-fifty with him;* that is why he took three thousand dollars, and used five thousand dollars for development; I bought my interest in the property, *in the futures,* and he took three thousand dollars, and it is referred to in a letter where they wanted him to kick me out, as they were sore because he had given me one-half. [pp. 116-119.]

* * * * * * * * * *

"I claim that for eight thousand dollars I paid to Mr. Dunfee I have a fifty per cent interest in anything that he might acquire in the indefinite future on the Orleans property; that is my idea." [p. 142.]

* * * * * * * * * *

Q. From October 10, 1918, to May 31, 1920, why didn't you go to Hornsilver and find out if the lease was

in operation? A. Because I wasn't president and general manager of the company, *and my contract was with the president and general manager* of the company, that is why I didn't do it, had I been president and general manager you can rest assured I would have been there.

Q. You hadn't any reason to suppose that any work was going on, had you? A. I didn't have any reason to think it was, I—

Q. You knew the treasury was empty, didn't you? A. Yes, I believe he told me when we were up there, there was about nine hundred dollars in the treasury, when we were there in 1918.

Q. You knew the property wasn't self-sustaining, didn't you? A. Yes, sir.

Q. And you knew that the lease would expire by its own terms, assuming that it was extended on August 1, 1918, would expire by its own terms on May 31, 1920; that is right, isn't it? A. Yes.

Q. And you never went near it? A. But I knew also that I was protected, and my stockholders were protected, because the thorough understanding if Mr. Dunfee had in fact gotten that property in his own name we would have been loser, *I understood all that, my stockholders all understood that as soon as Mr. Dunfee ever acquired that property I was selling them an interest in, that I had fifty-fifty*— [pp. 128-9.]

* * * * * * * * * *

He is no less frank about his attitude after the lease expired.

Q. From the *date of expiration* of that lease until you discovered the facts of this lease, or the facts on which you base your complaint, was thirteen months, wasn't it? A. I just didn't get that.

Q. I will have it read. (The reporter reads the

question.) A. Yes, sir, it was I think in the light *(sic)* of 1921.

Q. What interest were you taking in the Orleans property in that thirteen months? A. Well, I had never received any communication from Mr. Dunfee.

Q. What interest were you taking in the property? A. Well, I was just—I can't say I was taking any interest, that is, in the way of operating, or active in any way.

Q. What interest were you taking in the property? A. Well, I wasn't doing anything; I don't think I wrote any more letters, or sent any more letters during that time; *I thought I would eventually hear something from Mr. Dunfee, that is the way it stood; I hadn't heard anything.*

Q. *What made you think you would hear anything from him?*

A. *Because I was fifty-fifty in the property.* [pp. 155-6.]

* * * * * * * * * *

Q. *Your idea was if he ever in the future got an interest in the Orleans, then you would spring your fifty-fifty interest on him?* A. *Yes, sir.* [p. 157.]

From the time of the cessation of operations until June 1, 1920, the company's tenure was one of mere sufferance or tolerance. Referring to the statement in the August 1, 1918, report: "The owning company has given its consent in writing directing Mr. E. Carter Edwards to extend the lease for another year, that is to June 1st, 1920, which will be done," Edwards testified: "I never as a matter of effect (fact) extended that lease because the mine shut down after that" [p. 306], but "I did no acts to cut off the stockholders' rights until that

paper (the report) had expired, this is, until June 1, 1920. Then I exercised my right for the benefit of the company. The property was dilapidated, going into decay, and it would take thousands of dollars and I must and I did exercise my rights positively then in favor of the company. It would have been going on until now, and I would have had no mine. The property was being stolen, the stopes had fallen in."

Q. You consider that the Orleans Mining & Milling Company under this paper, Plaintiff's Exhibit 3, had rights to the property until June 5 (1?), 1920? A. I did, and I didn't violate any rights that they could have exercised up to that time.

Q. What kind of rights do you mean that you understood they had there up to June 1? A. The right to operate the mine.

Q. Under the old lease? A. Yes.

Q. And that is why you didn't do anything towards protecting the French Company, as you put it, by putting somebody in charge there and working until June 5, 1920? A. Yes, practically; I had warned Mr. Dunfee to communicate with Mr. Terwilliger, and to start it up, and I had offered to give another and new lease, two and a half years and 20% royalty, to do anything I could to get mining started. It was going a long time, the mine was getting in bad shape and I would have taken Mr. Terwilliger and his company on a new contract if they had come up and made a showing. [pp. 310-11.]

The natural and timeworn sequel to Terwilliger's evasion of his duties follows, and he is of course found denying that he had any knowledge of Dunfee's independent activities until July, 1922, more than a year

after these activities commenced. It had been his practice, while the mine was in operation, to keep privately advised by correspondence with an employee in the mine [pp. 169-70]. He knew by Dunfee's letter of March 24 that Dunfee wanted to, and had said that he thought he could, obtain a lease or extension of two and one-half years and that Dunfee had "looked the state over and (thought) there is a better chance on the Orleans than anything I saw." He knew of Dunfee's faith in the Orleans. He knew, as he alleges in his bill of complaint, that "Dunfee was on very close and intimate terms with said French Company (the lessor), and particularly with the said E. Carter Edwards, who was the agent and attorney-in-fact for said French Company, and that because thereof, he, the said Dunfee, could * * * obtain any renewal or extension of said lease." He admits and professes that he intended to claim a "fifty-fifty" interest in any lease Dunfee might get on the Orleans. He says that he at all times had his interest in mind, and that he was suspicious of Dunfee before and after the company lease expired. [p. 166.] He says he expected to hear from Dunfee, and did not hear from him. He kept himself informed of Southern Nevada mining affairs. He testified: "I did not take any newspapers from the southern part of the state, but I used to read the Goldfield papers and Reno papers quite often when I would be in Los Angeles; the 'Goldfield Tribune,' whatever the papers are there; I remember I read them once in a while, but I wasn't a subscriber to any Nevada paper. I would go to the news-stand and buy them once in a while. I didn't make a practice of

it; Mr. Dunfee sent me several papers, at different times while the property was running. My idea in getting the Southern Nevada papers from the news-stand was that I was interested in Hornsilver, and I was also interested in that state, that is, in a general mining way, and I would get the papers and look them over. I can't tell you how long I continued to do that; there was no definite time, no practice established." [pp. 170-1.] But he says that he did not see a Goldfield paper of April 16, 1921, containing an article headed "Dunfee Breaking Ore Nine Feet Wide at Hornsilver," nor one of May 28, 1921, containing an article headed "Orleans Ore Body, Seven and a Half Feet High," nor one of June 18, 1921, containing an article headed "New Find Is Made in Orleans Mine, Four and a Half Foot Wide of Ninety-dollar Ore Opened up on the 580-foot Level," nor one of June 25, 1921, containing an article headed "Shoot in Orleans Mine Is Over a Hundred Feet Long, Seven-foot Face of Forty-dollar Ore Now Being Broken by Lessee;" but he did immediately see a copy of the Tribune of July 16, 1921, containing an article headed "Sale by Dunfee Is $90,000 Mine Deal." [pp. 173-4.] In other words, he remained in total ignorance, and missed all of the newspaper accounts, of Dunfee's activities as long as there was a chance of his being called upon for a contribution; the instant that that chance was averted by the sale of the mine he found a newspaper account of it and was on his way to Tonopah to foment this litigation.

But it is not necessary to leave the matter of notice wholly to inference. Dunfee was trying in July, 1920,

to interest one Harry McMahan in his newly acquired lease [p. 253]. Mrs. Dunfee testified:

"I saw Mr. Terwilliger in 1920, August, I believe it was, in Los Angeles at about Fourth and Broadway street. We shook hands and he asked me if I had heard from Mr. Dunfee, and I told him no, and he said that he heard that Mr. Dunfee was about to sell the mine or the lease, I don't know which, to a Mr. McMahon, and he said if he did that he would land him in the pen." [p. 342.]

The foregoing was introduced partly by way of impeachment, and in laying the foundation for same Terwilliger was asked:

Q. Did you ever at any meeting with her speak to her about Mr. Dunfee's operations on the Orleans, and with respect to one Harry McMahon? A. Never; never remember mentioning Harry McMahon.

Q. You don't propose to say that you didn't mention him, do you? A. I say I never mentioned him *that I know of;* never.

Q. Did you ever hear of Harry McMahon? A. *I can't recall* who he is now.

Q. Did you ever hear of him? A. *I don't know;* I can't place him; can't tell who he is, Harry McMahon; would not know him if he was brought in here; could not identify him; don't know who he is connected with; don't know him.

Q. Did you ever hear of a mining man named Harry McMahon? A. McMillan?

Q. McMahon. A. No, sir; can't place the man at all.

Q. Didn't you say in effect to Mrs. Dunfee, at that time, you understood Mr. Dunfee was dealing with

Harry McMahon, or with McMahon on the Orleans? A. No, sir.

Q. And that if he sold the Orleans you would put him in the pen, or something of that sort? A. No, sir. [p. 168.]

It further appears that in April of the preceding year, 1919, Mrs. Dunfee, according to her testimony, had a conversation with Terwilliger in Los Angeles in which, as she quotes him, he said that he had Dunfee tied up in a contract whereby if he sold the mine or the lease he would put him in the pen. Mrs. Dunfee testified: "I don't know whether I told Mr. Dunfee exactly those words or not; but Mr. Terwilliger also said that if Mr. Dunfee came into California he would attach his automobile and I told Mr. Dunfee that in a letter." [p. 341.] That same month Dunfee wrote Terwilliger: "I'll excet (accept) your conversation with Mrs. Dunfee as your true feeling toward me." [p. 153.] As to this conversation Terwilliger testified: "I think I have had some conversation with her at the time she referred to, that *I might have said something while I was angry, I don't know what I said.* I did not say anything to the effect that if Mr. Dunfee came to Los Angeles I would have him put in the pen or to the effect that if he came to Los Angeles I would have his automobile seized. I never said anything like that to her at all." [p. 154.]

Moreover, Terwilliger's testimony is too conspicuously lacking in the candor expected of a party invoking equitable relief, to entitle his bald denial of notice to much weight. He says, in an attempted justification of his inertia, that in a conversation between himself and wife

and Edwards, "We discussed the amount of work that had been done in excess of the amount of work that was called for in that lease, and he (Edwards) said that it would apply on future extensions." [p. 98.] Immediately after this conversation [p. 125], in the course of which Edwards had promised an extension of the lease to June 1, 1920, Edwards drafted a circular letter to the stockholders, which Terwilliger signed, commenting on mine and market and war conditions and broadcasting the glad news of the lease extension, but unaccountably omitting any mention of this important and unprecedented concession with respect to past work. [p. 78.] Edwards flatly contradicts the Terwilligers on the point, and in Terwilliger's letter of September 30, 1918, demanding the closing down of the mine, Terwilliger purports to state every reason known to him in support of his demand, but unaccountably omits to mention this concession. [p. 17.] He omits to mention it in any of his ensuing correspondence with Edwards and Dunfee and he omits to mention it in his bill of complaint, which purports to set forth his entire grievance. That such a concession was made is inherently improbable; it was never heard of in the case until Terwilliger took the stand, and even if made was of no further significance after the lease expired. The only other reason assigned for his apathy is the alleged statement of Dunfee at the mine in 1918: 'Now, Cal, you leave it to me and everything will be all right, I will make us all some money" [p 99], and the alleged statement of Edwards at the same time and place: "Now, Mr. Terwilliger, you go down to Imperial Valley and tell the stockholders not to

worry about their investment, that their interest will be protected in every way." [p. 207.] But Dunfee and Edwards deny that they said these things, Terwilliger admits that Dunfee was then discouraged with the ore outlook and contemplated closing down, and that what he understood by these optimistic promises was: "I thought we would get together, and that we would finance the property again; we had plenty of stock, lots of stock never had been disposed of, the treasury had never been sold, to sell the stock and put a price on the property of $250,000, and turn the money into the company." [pp. 105-6.] Terwilliger swears that he never believed anything that Dunfee ever told him [p. 103], yet according to his verified bill of complaint he believed everything that Dunfee told him, and when challenged to state a single instance in which Dunfee had been anything but perfectly frank and honest with him, he was forced to resort to evasion. [p. 103.] He produced and allowed counsel to read in evidence a letter which he said he sent to Dunfee and was later compelled to admit that the letter was returned to him by the Post Office Department undelivered. [p. 108.] He seemed to be utterly insensible of the breach of faith involved in his attempted evasion of the provision of the pre-incorporation contract requiring him and Dunfee to contribute equally of their promotion stock toward future financing. [pp. 145-6.] He pleads in his bill of complaint and he swears in his testimony [pp. 121, 123] that he never personally concerned himself with obtaining lease extensions, yet he and his wife are found together and alone with Edwards when the August, 1918,

extension is granted, Dunfee being away in Hornsilver at the time and the Terwilligers being unable to give any plausible reason for their presence in Nevada at the time except the business of obtaining said extension [pp. 123, 210]. He says that he didn't even suggest the extension, but that Edwards, who was running for office at the time, volunteered it as well as the concession with respect to past work in a burst of political exuberance [p. 124]. He couldn't recall whether or not he had seen a ten-page, single-space typewritten letter written by Edwards to Mr. Cooke, Terwilliger's counsel, containing a minute history of the matters involved in this action [p. 126]. He admits that in a conversation in Hornsilver Dunfee accused him of trying to "gyp" Dunfee out of some of Dunfee's stock, but is able completely to evade a revelation of his part in this conversation [pp. 149.50]. He "does not remember" whether the stockholders met once or twice in Los Angeles [p. 159]. It "seems to him" that he remembers that at a meeting of stockholders it was resolved that all future stockholders' meetings be held in Los Angeles [p. 161], yet it is obvious that this resolution was passed for his own accommodation. He "thinks" he attended a meeting in Los Angeles [p. 161]. He doesn't "think" that any regular meeting of stockholders was held after the mine shut down [p. 162]. He admits that his only reason for charging Dunfee with concealment was Dunfee's failure to write him after Mar. 26 [pp. 164-5]. He doesn't "think" that Dunfee wrote him, doesn't "remember" that he wrote Dunfee, after that date [p. 165].

No one of Dunfee's verbal or written statements concerning the mine conditions and prospects is challenged throughout the trial. An outstanding fact in the case is that he gave his associates the benefit not only of everything that he knew about the mine but of everything that he hoped for it. The learned judge comments on the fact that Dunfee's mine activities were along lines suggested by his previous experience in the premises, but he fails to note that these lines were called to the attention of the corporation, its stockholders and officers, in written reports over Dunfee's signature as president and general manager. No one more freely admits Dunfee's impeccable candor than Terwilliger himself. The latter's attention being called to the verified statement in his bill of complaint that "in truth and in fact the mine showing continued to improve so that in March, 1920, the prospect for a large and paying mine was much more favorable than previously, all of which was well known to and understood by said defendant Dunfee," he was asked: "Is that a fact?"

A. That was the intelligence that he gave me on the property when he conferred with me by letter, that it was the best property that he had seen, and the chances were better than any place; he had been all over the state, and that the chances on the Orleans were better than any place he had been; that was the intelligence I received, my last communication through letter from Mr. Dunfee was that it was the best property in his opinion that he had seen; I based every bit of my confidence in this property on Mr. Dunfee's judgment at all times; my personal judgment on this property was never instrumental in my financing this property at all, it was Mr. Dunfee's.

Q. Was it a fact that the mine showing continued to improve, so that in March, 1920, the prospect for a large and paying mine was much more favorable than previously? A. We had done a great deal of development work there, the Orleans Mining and Milling Company had.

Q. Answer the question; is it a fact? A. I can only answer that by the intelligence he gave me in 1918, that it was the best property.

Q. He didn't write you the mine was improving? A. He wrote me the chances were better there than any other place he had been.

Q. Did he tell you the mine was improving? Haven't you told the court you knew the mine was idle for twenty months? A. Beg pardon.

Q. Haven't you told the court you knew the mine was idle for twenty months? A. Idle for twenty months?

Q. Up to the time of the expiration of the lease? A. Yes, I think I made that statement.

Q. Well, is it a fact that the mine's showing continued to improve so that in March, 1920, the prospect for a large and paying mine was much more favorable than previously? A. Well, I base my—

Q. Well, is it a fact? A. It must be a fact; Mr. Dunfee advised me that the chances were better there than any place he had been, and I based my opinion on Mr. Dunfee's judgment of the property, and if I raised any more money it would have been entirely on Mr. Dunfee's judgment of the property. That was the intelligence that I received from Mr. Dunfee, that it was the best property he had seen, and he had looked over all of it, and that the chances were better there for a paying mine than any place he had been. [pp 137-8.]

No evidence whatever was offered by plaintiff in support of the issue of concealment or the issue raised by the allegation that "in truth and in fact the mine showing continued to improve so that in March, 1920, the prospect for a large and paying mine was much more favorable than previously, all of which was well known to and understood by defendant;" but Dunfee nevertheless took the burden of establishing the negative of these issues.

H. McMahon, a practical mining man of ripe experience, who visited the mine in July, 1920, with a view to interesting himself in it [p. 253], testified that the mine showing would not justify "any payment." He said: "Mr. Dunfee made no representations of ore, and I saw none. I won't say that exactly; there was some ore there, but there was no tonnage" [p. 254]. A. I. D'Arcy, who purchased the mine from Dunfee a year later, whose qualifications as a mining engineer were admitted [p. 256], and who accompanied McMahan in the latter's examination, testified: "I came to the conclusion that there were no ore bodies in sight in the mine, that is, of the commercial grade of ore that we were looking for, and at that time I remember of taking a few samples just simply to verify that opinion; I don't think there were very many of them. I think there was only four or five."

Q. You say there were no ore bodies; was there any mineralized ore in sight? A. Yes, there was quartz; there was the ordinary vein filling that you find in this particular character of veins.

Q. Now I ask you to compare the work on that 600-level done by Mr. Dunfee after the time you were there,

that you have just described, with the rest of the work in the mine. A. Well, that was very much higher grade stuff, I know, because I had the privilege of sampling it, and finding that it was a very much better grade, and subsequent sampling that has been done in the mine has proven that those upper exposures were of low-grade stuff, low-grade material.

Q. Did you measure that additional work done by Mr. Dunfee? A. I think I did; yes.

Q. To what extent was it sampled? A. Well, every five feet, it was sampled very thoroughly.

Q. Can you tell the court on the strength of what you entered into the deal with Mr. Dunfee that is involved in this action? A. It was entirely on the showing beyond the point of the drift in July, 1920, and what I saw, I think it was in April, 1921; in other words, it is the point just beyond the red vertical line, that is taking into consideration my objection to the red line not being quite far enough this way. [pp. 260-61.]

(The "red vertical line" marked the point where work under the company lease stopped and where Dunfee's independent activites began.)

Gordon Bettles, a mining engineer, testified that in October, 1920, he made a "thorough examination of the property, covering almost two days, and did some sampling" [p. 261]. "My examination was with respect to values in sight if there were any such. I did not find any that I could consider of commercial value." [p. 262.]

Wm. Sirbeck, a mining man with experience in mine examinations, visited the property in Jan., 1921. He did not find any bodies of ore; found some mineral; took two assays running under ten dollars. He testified: "As the result of my examination, I rejected the prop-

erty on the ground that I didn't feel like paying any cash for something without any commercial ore in sight." [pp. 263-64.] McMahan had refused to entertain an offer of the property at $6000. [p. 253.] Bettles had refused to pay $2000 cash and 20% interest in a company to be formed to finance and work the property. [p. 262.] The deal with Sirbeck was for $2500 flat. [p. 263.]

There is no evidence in the record to offset the foregoing showing, not even from Terwilliger, who says (speaking of a time when the company lease was in operation): "I was down in the mine I think three or four times. I know something about practical mining. I know how to catch up ground, and protect the ground, and do general mining, and raising and stoping and sinking, and almost everything there is about mining, running a hoist and those things. I myself mined for a number of years." [p. 144.]

Dunfee's account of his independent activities, commencing at page 273 of the secord, follows:

Q. How did you come to take the June 5th, 1920, lease? A. Well, we could not get any satisfactory letters from Mr. Terwilliger, nothing of the kind, and the lease had run out, it had been cancelled a year before that.

The Witness.—Continuing.) The circumstance that led up to my taking the lease was, Judge Edwards asked me if I would take a lease on it and go to work. I wanted to test—wanted to do some work on the 300-foot level. I went to work about a week or ten days or two weeks after taking the lease. At first I employed a

Mr. Burke and Mr. Mitchell as miners, and I was working myself. I was paying Burke and Mitchell out of my own pocket. I worked them until Mr. McMahon (previous witness) was about to buy the lease in July, then we closed down for while; these two men and I worked about two months and a half and that took me up to the time Mr. McMahon came to examine, and I did about twenty days work at that time. After Mr. McMahon had been there I continued the work with Burke and Mitchell for the balance of the terms of two and a half months—that is the idea I desired to convey; [215] two and a half months all told. That was all at my own expense and I was working myself, sharpening steel and going down the mine. After I closed down in August of that year—1920—I made a trip to Los Angeles with the view of financing the whole camp. That was the last of August, 1920; then the 2d day of January, 1921, I went back and went to work alone in the mine. I hadn't been there from the last part of August until January 2d of the next year, 1921. The result of my work with Burke and Mitchell was nothing, we found no ore. I did 137 feet of work. When I returned in January I went to climbing the shaft and worked all alone at the 600-foot level; I first drove in a drift about ten feet on the 600-foot level at the point where the Orleans Mining & Milling Company left it. That is southeast of the line drawn by Mr. Downer on the map in evidence. The June, July and August, 1920, work was on the 350-foot level. I didn't start on the 600-level until I went back alone in January, 1921. I worked two months and sixteen days alone on the 600-level, except one man worked about five days with me during that time. He worked at my expense. I did at that time while working alone about 70 feet of work. Sometimes I had to go up and down the shaft twice a day; worked until eleven o'clock at night; got up early

in the morning, and after the showing got to be good, got in some low-grade ore, I would come back on that night and stay until eleven o'clock. That carried me up to the 15th day of March, 1921. I then had some ore in sight; thought I could pay the men if I put them on, so I arranged for Joe Vernon, Andy Krion and Westfall to muck out the ore that I had stored in there; I had the drifts stored full; could hardly get in there, and worked 18 days, taking chances for their money of my getting out a shipment of ore. I also told them that if they didn't get the shipment out I had a life insurance I would put up; they would be sure of their money if they would just give me a [216] little time. While they were mucking I was running the hoist. After they got the muck out I had to drift about 30 feet where I had found the ore in an incline upraise into the hanging-wall side of the vein. (Witness indicates point on map, pointing to line made by Witness Downer.) It does not appear on this map except by that portal to which the Downer line runs. (Witness marks letter "c" on the plat to indicate southeasterly work.) Then I raised about 12 feet into the vein, on the incline, then drafted about 8 feet in the vein up there in that cross-cut, and then at the end of that I raised up, and there is where I got the ore, about 8 feet. That was the first ore that looked like pay ore that I got after I took the second lease. I did this working there alone, this gopher hole. It was afterwards that I employed men to muck and they mucked out, and I drove a drift under this other work. I went ahead with the work, kept on drifting southeast, underneath the work I last described on the map, about 130 feet all told. That took me to the end of the cross-cut as indicated on the map. That is 130 feet from where I commenced near the Orleans Mining & Milling Company stope. That is 130 feet from the Downer

line on the map. My first carload of ore brought in about $234.00; it didn't pay; just able to pay my powder and gasoline and keep on working. I got out the first carload of ore about the middle of April, 1921, and then I gave an option to the Tonopah Mining Company and we didn't do any work for about three weeks. I spent all the time then sampling the mine, and running the hoist, while Mr. Carper, who represented the Tonopah Mining Company, and the force of men were sampling the mine. I do not know where Mr. Carper is. He was in Utah the last time I heard from him. The Tonopah Mining Company spent about five weeks all told sampling the property. They sampled it in ten-foot blocks; where there were indications of ore, took some 334 samples. This was in order to see whether [217] or not they would purchase the property. Their work took into about the middle of May, 1921. After they told me they would not pay any money down for the property, I got my men together again and went back to work at my own expense, and I had no money to pay them, and I told them they had to take chances on the ore or my life insurance for this money and they all agreed to. I worked myself and continued working myself continuously until I sold out to Mr. D'Arcy. After I got in where I began to take out ore I had 5 or 6 men. I shipped about $5,000.00 worth of ore before I closed with Mr. D'Arcy. This ore netted me about $5,000.00, the ore I shipped, but it didn't pay out all bills and back things I owed for operating the mine on my own account. I was still in debt about $1,000.00 when I sold to Mr. D'Arcy. I did not at any time after closing down the lease of the Orleans Mining & Milling Company, or before its closing down, practice any concealment of any kind toward Mr. Terwilliger or anybody connected with the company.

Finally, Terwilliger's laches, from July, 1921, when he admits he learned of Dunfee's sale of the mine, to April, 1922, when this suit was commenced, remains utterly unexplained. August 2, 1921, he notified Dunfee and the purchaser in writing that the Orleans Mining and Milling Company "claims all money and shares of stock which said J. W. Dunfee is to receive," etc. [p. 181]. Thus matters stood until this suit was commenced, when Terwilliger, after nine months of deliberation and investigation, concluded that he did not want the money and stock but would take the lease itself Another eight months elapse and this case comes to trial, whereupon Terwilliger changes his mind again and decides that he will return to his first preference and claim the money and shares. His entire explanation of his delay given on direct examination follows:

"I went to Tonopah and employed Mr. Atkinson to look into the matter, and he took up the case, and he made a trip or two to Goldfield and he didn't do anything, so I afterwards arranged with other counsel; it was several months before he notified me that he could not go on with the case, and then I secured the services of Messrs. Cooke, French & Stoddard. I think that was in March of this year." [p. 100.]

It appears on cross-examination that he employed Mr. Atkinson in about the middle of July, 1921. In September, 1921, Mr. Atkinson notified him "that it was impossible to go on with the case along the lines we had outlined." He then waited until March, 1922, to release Mr. Atkinson and employ present counsel. His cross-examination in full on this branch of the case follows:

"I employed Mr. Atkinson as counsel in the beginning. I could not stipulate just what to do, because I would not be the dictator of his action. He was my counsel up to a certain time; that was just before I employed Cooke, French & Stoddard. Arrangements were made for his services satisfactory to him. I employed Mr. Atkinson as counsel in the beginning, and at such time as he notified me, *up until September*, that it was impossible to go on with the case along the lines we had outlined; *then I immediately employed Cooke, French & Stoddard.* Mr. Atkinson outlined some plans as my counsel. That notice is the procedure; then from time to time I had letters where he would try to get intelligence on the case; that was about the nature of the procedure. *It was quite a few months before I concluded to change counsel—from the middle or latter part of July until March of this year*—until I released him as counsel and notified him that I was going to consider other counsel if it was agreeable, and he approved it. I employed him to investigate in detail and I deemed he would do whatever he considered necessary as my counsel. I think he applied to Mr. Edwards for leave to examine the corporate records and papers pertaining to the case. I think I signed a letter authorizing Mr. Edwards to show him everything. I think he looked at the books and everything a very short time after I employed him.

"Q. Do you know whether or not he encountered any concealment on anybody's part?

"A. Well, I don't think he ever mentioned to me anything about these letters you have shown me here, or anything of that kind.

"Q. Did he find a disposition on anybody's part to conceal anything from him? A. I don't know." [pp. 183-84.]

Mr. Atkinson was not called.

A written opinion was delivered by the court below after over three years of deliberation. Throughout it there is not even an intimation of actual fraud on Dunfee's part. The learned judge says that "the mine was self-sustaining," but this is contrary to the direct averment of the bill of complaint [p. 10] and to all of the evidence. He says that "Dunfee's mining appears to have been on the six or seven hundred foot level of the mine, and was not of a character to attract attention." This is the nearest to an intimation of concealment on Dunfee's part, if it was so intended, but it takes no account of the sensational newspaper publicity given Dunfee's activities. Terwilliger's extraordinary remissness, his admitted flagrant violations of contractual and corporate duty, are totally ignored. Preposterous as the statement may sound, the opinion can stand only if it be the law that a corporate officer can never under any conceivable circumstances acquire an independent right in anything that the corporation ever owned, and that a lessee must be conclusively credited with an expectation of a renewal of his lease, although he most manifestly does not in fact want it renewed.

The judgment requires Dunfee to turn back $40,000, whereas up to the time of the trial he had received but $20,000.00 [p. 228]; and it allows him nothing for his risk, expense, time, or labor. Moreover, it runs to Terwilliger personally, instead of to the Orleans Mining and Milling Co., for whose use and benefit the action is prosecuted.

(Lest the above statement with respect to Dunfee's receipts mislead, we venture out of the record to state that he has since the trial received an additional about $9000, leaving still due him about $11,000, in which latter amount only, therefore, is the judgment now excessive.)

SPECIFICATION OF ERRORS.

1. Said decree is erroneous and contrary to the pleadings in this, that plaintiff's complaint sets forth facts which, if true, entitle him, if anything, to a decree adjudging, and plaintiff in the prayer of his complaint specifically prays judgment, that the Orleans Mining & Milling Co. is the owner and entitled to the possession of a certain mining lease dated June 5, 1920, and the leased premises, and a certain "modification, renewal and extension" thereof dated January 1, 1921, whereas by its said decree the court adjudged that certain 150,000 shares of stock and $40,000.00 in money were received by defendant Dunfee as trustee for plaintiff and that he deliver and pay the same to plaintiffs. [43]

2. Said decree is erroneous, unsupported by the pleadings, and contrary to the evidence, in this, that the complaint charges that defendant Dunfee sold said lease to the Orleans Hornsilver Mining Co. upon the agreement of the latter to "pay to said defendant Dunfee, in installments from time to time an aggregate of $5,000.00 in cash and 150,000 shares of its capital stock"; the evidence shows without conflict that said money consideration was $40,000.00 payable in installments, of which but $20,000.00 had been paid; nevertheless the said decree adjudges that defendant Dunfee pay and deliver over to plaintiff $40,000.00 without deduction.

3. Said decree is erroneous, unsupported by the pleadings, and contrary to the evidence, in this: that it adjudges that defendant Dunfee received said stock and money as the purchase price for a lease in which the Orleans Mining & Milling Co. was interested as lessee, whereas the evidence shows without conflict that the only lease in which said company was interested, to wit: the lease of June 19, 1915, expired by its own terms

on May 31, 1920, and was moreover expressly cancelled by the lessor on May 30, 1920, for the total failure of the lessee for over nineteen months to perform any condition thereof.

4. Said decree is erroneous, unsupported by the pleadings, and contrary to equity and the evidence, in this: that it adjudges that defendant Dunfee, as an officer of the Orleans Mining & Milling Co., received said stock and money as the purchase price of a lease in which said company was interested, whereas the evidence shows without conflict that after the lease owned by said company expired by forfeiture on May 30, 1920, and by lapse of time on May 31, 1920, defendant Dunfee, on June 5, 1920, took in his own name and right a new lease which he abandoned in October, 1920, after several months' unsuccessful effort at his own expense, labor and risk to discover commercial ore thereunder; that in [44] January, 1921, he reluctantly, at the instance of the lessor, re-entered the premises under a parol tentative arrangement with the lessor that if, after further exploration, he felt justified by the ore showing in requesting a written lease on better terms he could have it; that after several months further effort at his own risk, labor and expense he, in March, 1921, discovered ore justifying such request; that said parol tentative agreement was then consummated by the giving to him of a written lease dated back to the date of his last entry, to wit, January 1, 1921, and the same is the lease which he sold to the Orleans Hornsilver Mining Co. for said money and shares.

5. Said decree is erroneous, contrary to the evidence and against law and equity in this: that it necessarily implies a finding of fact and conclusion of law that because defendant Dunfee was the onetime active, and may be still the nominal, president, etc., of the Orleans

Mining & Milling Co., he can forever be held to a duty to said company, while the said company, as shown by the evidence without conflict, wholly ceased since October, 1917, to function as a corporation, thereby wholly failing in its reciprocal duty to defendant Dunfee so to function.

6. The evidence shows without conflict that defendant Dunfee, as the owner of a leasehold estate in the Orleans mine, assigned the same to the Orleans Mining & Milling Co. on the express and implied condition that said company would keep said estate alive by operating and preserving said lease; that said company for over nineteen months wholly failed to perform said express and implied condition, for which reason said estate was lost both to it and defendant Dunfee; and said decree is contrary to the evidence and against law and equity in that it necessarily implies a conclusion of law that defendant Dunfee was not entitled in such circumstances to retake said estate in his own right as a measure of rescission. [45]

7. The evidence shows without conflict that the Orleans Mining & Milling Co. not only had no means with which to operate said lease or any extension thereof, but had no effectual or *bona fide* intention, willingness or ability to raise means therefor, and said decree is contrary to the evidence and against law and equity in that it necessarily implies a conclusion of law that defendant Dunfee, as a large stockholder in said company (and *a fortiori,* as the original owner of said lease), was not entitled in such circumstances to take a new lease of said premises in his own right as a measure of salvage of his investment in said enterprise.

8. The evidence shows without conflict that the Orleans Mining & Milling Co. never by any act or omission of any kind evinced or held a hope or expectancy of a

renewal of said lease, but on the contrary, by all of its conduct or want of conduct showed that it had no such hope or expectancy, and said decree is contrary to the evidence and against law and equity in that it necessarily implies a conclusion of law that in the face of such circumstances a lessee is in effect to be conclusively credited with entertaining such hope or expectancy.

9. The averments of the complaint show, and the evidence shows without conflict, that if plaintiff personally (apart from his character as a stockholder and officer of the Orleans Mining & Milling Co.) held any hope or expectancy of a renewal of said lease, it was wholly based on the terms of the pre-incorporation agreement pleaded in the complaint, and that this hope or expectancy was further based upon an outspoken belief on his part that under said pre-incorporation agreement he was entitled to follow into defendant Dunfee's hands any interest that the latter might ever in any way acquire in the Orleans property, although he, plaintiff, might in the meantime have wholly disregarded his reciprocal obligations under said pre-incorporation contract; moreover, the evidence shows without conflict that plaintiff, in this [46] belief, knowingly and deliberately disregarded his said reciprocal obligations, and knowingly and deliberately laid back with the avowed intention on his part, while himself doing nothing to further the enterprise, to assert a right to the fruits if Dunfee succeeded, and to shirk all responsibility for the risk, time, labor and expense if Dunfee failed; and the decree is contrary to the evidence, and against law and equity, in that it implies a conclusion of law that plaintiff in so acting is not barred by his laches and unclean hands.

10. The evidence shows (*not* without conflict) that Terwilliger knew from the first of Dunfee's independent activities; it shows *without* conflict, and by Terwilliger's

own admission, that he knew of Dunfee's independent activities as early as July, 1921, the date on which Dunfee's sale to the Orleans Hornsilver Mining Co. became public; nevertheless he and his attorneys, without excuse or explanation of any kind pleaded or offered in evidence, delayed the commencement of this suit until March, 1922; and said decree is contrary to the evidence and against law and equity in that it implies a finding of fact and conclusion of law that plaintiff in so delaying is not barred by his gross laches.

11. Said decree is contrary to the evidence in this, that said decree implies a finding, and the court in its formal findings, Par. I, finds, that the "mine showing (in the leased premises) continued to improve so that in March, 1920, the prospect for a large and paying mine was much more favorable than previously, all of which was well known to and understood by said defendant Dunfee," whereas the evidence shows without conflict, and all parties admitted without reserve throughout the trial, that said mine was wholly inactive from October, 1917, until after May 31, 1919; and the evidence shows without conflict that during said period of over nineteen months the mine was falling into decay and dilapidation and its movable machinery was stolen. [47]

12. Said decree is erroneous and contrary to the pleadings and the evidence in this, that the same implies a finding (and the Court found in writing in its written decision) that the leased premises were, until May 31, 1919, self-sustaining, whereas the complaint, Par. VIII, and Par. I of the Court's formal findings, declare, and the evidence shows without conflict, that said premises were not self-sustaining.

13. Said decree is erroneous and contrary to the evidence in this, that it implies a finding, and the court

in its formal findings, Par. I, finds that "said defendant Dunfee, having on or about March, 1920, conceived the intent and purpose of cheating and defrauding said Orleans Mining and Milling Company out of its said leasehold estate and property, and also to cheat and defraud plaintiff and other stockholders similarly situated out of the value of their stock in said corporation, and with the fraudulent intent and purpose to obtain and appropriate to his own use and benefit the said property, on or about June 1, 1920, when said French Company's lease to the Orleans Mining and Milling Company expired, the said defendant, Dunfee, while still a director, president, treasurer and general manager of said Orleans Mining and Milling Company as aforesaid and in exclusive charge of its business and operations, did secretly negotiate for and later, to wit: on June 5, 1920, obtain from said French Company a lease of said mining claims," whereas the evidence shows without conflict that Dunfee's conduct was pursued fairly, without concealment, under a belief and *bona fide* claim of right justified by all of the circumstances, after every duty that he owed to the Orleans Mining and Milling Company had been performed, and at a time when he owed no duty whatever to said company.

14. Said decree is erroneous in that it runs to plaintiff personally instead of to the Orleans Mining and Milling Co., on whose behalf plaintiff, as stockholder, brings this suit. [48]

15. Said decree is erroneous and against equity in that, while it adjudges that defendant Dunfee, in acquiring and selling the lease of January 1, 1921, was acting for the Orleans Mining and Milling Company, it allows him nothing for his risk, time, labor and expense.

16. The Court erred in overruling defendant Dunfee's motion that said cause be dismissed as to him, made at

the commencement of the trial, upon and after the voluntary dismissal of the cause as to defendant Orleans Hornsilver Mining Co., said motion being made upon the ground that the dismissal of said dismissed defendant left no cause of action stated against defendant Dunfee, in this, that plaintiff by his complaint elected to seek to recover the Orleans lease and mine in kind from its purchaser, the Orleans Hornsilver Mining Co., thereby repudiating the sale by Dunfee, while by the dismissal plaintiff sought to abandon said election, reverse his position, ratify Dunfee's sale, and follow the proceeds into his hands; to which ruling defendant Dunfee duly objected and excepted.

16*a*. The Court erred, over defendant Dunfee's seasonable objection and exception, in admitting in evidence against him statements attributed by witness C. A. Terwilliger to E. Carter Edwards, said to have been made not in Dunfee's presence, and without circumstances binding Dunfee by Edwards' declarations, as follows:

> The WITNESS.— . . . Referring to report of stockholders dated August 1, 1918, I was in Goldfield at that time and had a conversation with Mr. Dunfee or Mr. Edwards or both of them relative to the property and its condition, or what the prospects and future policy of the company would be. We had a conversation the first afternoon we went in to Mr. Edwards; that was, I think, August 1, 1918, or July 31, one of the two days. There were present Mrs. Terwilliger, Mr. Edwards and myself.
>
> Q. And what if anything was said?
>
> Mr. TILDEN.—Is that offered for the purpose of showing any [49] agreement not embodied in that August 1st letter?
>
> Mr. STODDARD.—No, but for the purpose of showing the representations of Mr. Dunfee and Mr.

Edwards to the plaintiff in this action, and his confidence in those statements upon which he relied subsequently.

Mr. TILDEN.—We object to any conversation between this witness and Mr. Edwards. There is no relation of any kind shown to exist between Edwards and Dunfee by which Dunfee would be bound by what Edwards said, and Edwards is not a party to this suit, at least he is not appearing as a party.

Mr. FRENCH.—He is one of the defendants.

Mr. TILDEN.—Well, he is not here defending.

Mr. STODDARD.—Mr. Edwards is one of the defendant directors of the company.

The COURT.—I will allow the testimony to go in, but it will go subject to the objection.

The WITNESS.—Mr. Dunfee was not present at this conversation. . . . Then we discussed the amount of work that had been done in excess of the amount of work that was called for in that lease, and he said that it would apply on the future extensions. . . .

18. The Court erred in admitting in evidence against defendant Dunfee statements attributed by witness Mrs. C. A. Terwilliger to E. Carter Edwards, made not in Dunfee's presence and without circumstances binding Dunfee by Edwards' declarations, over defendant Dunfee's seasonable objection and exception, as follows:

The WITNESS.— . . . The first conversation took place in the office of Mr. Edwards in Goldfield the evening either of the 31st of July, 1918, or the 1st of August, 1918. Mr. Edwards, Mr. Terwilliger and myself were present.

Q. What, if anything, was said referring to the mining operations or to mining properties?

Mr. TILDEN.—Objected to on the ground defendant Dunfee was [50] not present, and no such connection is shown between him and Carter Edwards as would bind him by anything that was said. The same objection that was made previously and Your Honor took the testimony provisionally.

Mr. STODDARD.—Your Honor will recall that Mr. Edwards is one of the defendants in this action, that he is also secretary of the company, and likewise attorney-in-fact for the French Company, so any statements Mr. Edwards may have made relative to the issues of this case, or as to extensions, or any other matters involved in the issues of this case, I think would be material.

The COURT.—As long as Mr. Edwards is a defendant I do not very well see how I can refuse to admit this defendant.

Mr. TILDEN.—He is a mere formal defendant; he is a defendant merely by virtue of his being a director of the company on behalf of which the action is brought. He is made a defendant to comply with the rule of pleading that when a dissenting stockholder begins a suit, he should make defendants those directors to whom he had unsuccessfully appealed to take action on behalf of the corporation in its own name. He is not affected by this action in the slightest degree.

The COURT.—Well, the testimony will be admitted subject to your objection made in behalf of Mr. Dunfee; I don't understand you make it any further?

Mr. TILDEN.—No, that is all.

The COURT.—Proceed.

The WITNESS.— . . . Mr. Edwards stated that the amount of excess work that the Orleans Company had done more than required by the lease would apply on future extensions of the lease. . . .

19. The Court erred, over defendant Dunfee's seasonable objection and exception, in admitting in evidence, through the witness A. I. D'Arcy the facts of the transaction whereby Dunfee sold the lease of January 1, 1921, as follows: [51]

Q. Was the transaction that you had with Mr. Dunfee with reference to this lease?

Mr. TILDEN.—This is objected to on the ground the cause of action relates to a certain lease made in the month of June, 1920; this is not the lease; this is a lease made months afterwards, and there is neither pleading nor proof to connect the lease in question with the lease pleaded.

Mr. STODDARD.—There may be, if the Court please, a variance in this proof, and it may be necessary for us to amend our complaint to conform to the facts; I realize that.

Mr. TILDEN.—Well, that would not help, because there is nothing to bridge the gap between these two transactions. . . . The contract pleaded on calls for extensions or purchases thereto belonging; I will read the whole paragraph so that the meaning of "thereto belonging" will be clear (reads): "In consideration of the party of the first part giving to the party of the second part a fifty per cent interest in and to the Orleans Development Mining and Milling Company, consisting of a lease on the following five claims"—naming the claims—"together with all other extensions or purchases thereto belonging," evidently meaning belonging to said

lease, "said second party agrees to raise," and so forth. There is no proof that this is an extension of the lease mentioned in this contract; in fact, upon its face it purports to be a totally new lease; there is no fact alleged and no fact introduced, why your Honor should disregard the legal aspect of it as a totally new lease, and give it an aspect that it does not bear, to wit, an extension. . . .

The COURT.—I will overrule the objection, and the testimony will go in subject to a motion to strike it out.

Mr. TILDEN.—Will Your Honor allow me an exception at this time, so I will not have to make the motion to strike?

The COURT.—Yes, you may have your exception now. [52]

20. The Court erred in allowing plaintiff, over defendant Dunfee's seasonable objection and exception, to amend his complaint, contrary to the evidence, and thereby materially departing from the cause of action stated in the complaint as filed, by changing part of the wording thereof to read: "Did secretly negotiate for and later, to wit, on June 5, 1920, obtain from said French Company a lease of said mining claims, and on or about January 1, 1921, obtain a modification, renewal and extension of said lease, and thereupon the said Dunfee"—as follows:

Mr. TILDEN.—We object (to the offered amendment) on the ground it is not justified by the showing made by the plaintiff. The only showing in this behalf is from the lips of Mr. Edwards, to the effect that this June 5th lease was surrendered in the fall of 1920, and was thereupon marked cancelled by himself, attorney in fact for the lessor company.

The further objection is that it is a matter of construction as to whether or not anything is a modification, renewal or extension. There certainly is no evidence that lease number three was intended as a modification, renewal or extension, and if upon its face it was such, then it speaks for itself, and becomes a matter of law as to what it is and its character. . . .

The COURT.—I will allow you to make the amendment. Of course it will be subject to the objection. . . . You may take your exception.

21. The Court erred, over defendant Dunfee's seasonable exception, in denying the latter's motion to dismiss made at the close of plaintiff's case, as follows:

Mr. STODDARD.—That is the plaintiff's case in chief.

Mr. TILDEN.—At this time defendant Dunfee moves for a dismissal on the ground that no equity is shown by the complaint, and none is shown by the evidence; and on the ground heretofore raised in the previous part of the trial, namely, that the dismissal [53] of the action as to the D'Arcy Company leaves no cause of action as to anybody. . . .

The COURT.—I will overrule the motion for the present.

Mr. TILDEN.—Your Honor will allow us an exception?

The COURT.—Certainly.

22. The Court erred, over defendant Dunfee's seasonable exception, in sustaining plaintiff's objection to a question propounded to defendant Dunfee seeking to establish the latter's good faith in taking the lease of June 5, 1920, as follows:

Q. When you took this lease of June 5, 1920. what did you think as to whether or not Mr. Terwilliger had abandoned the enterprise?

Mr. STODDARD.—Object on the ground that it is incompetent, irrelevant and immaterial as to what he thought about it; it would not be any evidence and would not be binding upon Mr. Terwilliger or those that he represents; it would be a mental process uncommunicated to anybody.

Mr. TILDEN.—He is charged with fraud, and I think we have a right to purge him.

The COURT.—It does not seem to me that it is a very material matter, but I will let you put it in subject to the objection; the fact he thought they had abandoned it would not change the rights of the various parties in any way that I can see.

Mr. TILDEN.—Well, answer it subject to the objection.

A. Yes, I certainly thought they had abandoned it.

23. The Court erred in deciding said cause in favor of plaintiff and against defendant Dunfee.

24. The Court erred in rendering a decree in favor of plaintiff and against defendant Dunfee.

BRIEF OF THE LAW.

I.

The Judgment Is Excessive.

This point is covered by Specification 2, Tr. p. 48.

The judgment orders that "said defendant J. W. Dunfee pay and deliver over to the plaintiffs above named the sum of $40,000.00 * * *." [p. 45.]

The only testimony in the record as to Dunfee's receipts is that of A. I. D'Arcy, the purchaser, as follows:

"The consideration we gave to Mr. Dunfee was $15,000.00 paid on the 18th day of July, 1921. I made that individually. On the 3rd day of January, 1922, there was a payment of $4,028.33 made to Mr. Dunfee. * * * The Orleans Hornsilver Mining Company" (for which D'Arcy was acting) "now owes Mr. Dunfee $20,000.00 on account of this contract. At the present time that is in the form of notes; we have given the company's note for $20,000.00 due June 1, 1923." [p. 228.] The case was tried in December, 1922.

II.

The Judgment Is Erroneous in Running to "Plaintiffs" Instead of to the Corporation, for Whose Use and Benefit the Action Is Prosecuted.

[Spec. 14, Tr. p. 54.]

Direct relief to the stockholders cannot properly be adjudged.

6 Fletch. Enc. Corp., p. 7009.

Judgment should run to corporation, not to plaintiffs.

Elbing v. Nekarda, 132 N. Y. Sup. 309;
Politz v. R. Company, 152 *id.* 803;
Voorhees v. Mason, 254 Ill. 256, 91 N. E. 1056;
Lawrence v. S. P. Co., 180 Fed. 822; appeal dismissed, 228 U. S. 137, 57 L. Ed. 768.

III.

The Judgment Is Erroneous and Inequitable in Not Allowing Dunfee Anything for His Risk, Time, Labor and Expense.

[Spec. 15, Tr. p. 54.]

"While it is true the court might impose upon the appellants the payment of their proportionate share of labor and expenses as a condition of relief, it could not compensate the defendants for the risk assumed by them that their exertions would come to naught."

Steinbeck v. Mg. Co., 152 Fed. 333;
Patterson v. Hewitt, 195 U. S. 309 (319).

IV.

Terwilliger's Election to Recover the Lease Itself Was Final and Irrevocable, and the Court Erred in Allowing Him to Re-elect and Demand the Money and Stock.

[Spec. 1, Tr. p. 47; 16, p. 54; 21, p. 61.]

Terwilliger's earliest election was the written demand caused to be served upon the purchaser, claming the money and stock. [p. 181.] This was done in August, 1921.

He then delayed the commencement of this suit until April of the following year. By that time the mine evidently looked better to him than the proceeds of the sale, and his pleading is an unequivocal repudiation of the sale and demand of the lease and leased premises. Another eight months elapse and the case goes to trial, whereupon Terwilliger returns to his first preference. He does not do this upon the ground that his claim of the lease and premises was the "fatuous choice of a wrong remedy," but upon the ground that his claim of the money and stock could not be supported by proof. His counsel said:

"Now at the time Mr. Cooke drew that complaint, he had information, as stated, that the Hornsilver Mining Company" for whom D'Arcy purchased the lease from Dunfee "took this property knowing all of the facts; we have since been unable to verify that statement by any proof, and for that reason we ask that the Hornsilver Mining Company be dismissed from the suit, because we will fail to connect it up with knowledge, but that leaves the defendant Dunfee in the same position he has always been." [p. 67.]

The foregoing was in answer to Dunfee's motion to dismiss, based upon the ground that he, Dunfee, was a mere nominal party in the action for the recovery of the premises, and that the dismissal of the real party left no cause of action stated as to anybody.

The remedies asserted by Terwilliger are not alternative.

The remedy against the purchaser is not available against Dunfee, because Dunfee has parted with title to the subject-matter.

The remedy against Dunfee is not available against the purchaser, because the purchaser has parted with the money and stock.

In choosing the purchaser as a defendant, Terwilliger waived Dunfee as a defendant.

He also committed himself to a position as to the sale, as to whether he would regard it as a right or a wrong. His first election subjected Dunfee to a claim by the purchaser for a return of the purchase money, on the ground of a failure of consideration. This was a repudiation of Dunfee's act in making the sale. The second election subjected Dunfee to a claim by Terwilliger for the purchase money. This was a ratification of Dunfee's act.

We submit that a party may not subject a defendant first to one plaintiff and then another, and our position is supported by the following authorities:

Fowler v. Bank, 113 N. Y. 450 (453);
Terry v. Munger, 121 N. Y. 161;
Gardner v. Ogden, 22 N. Y. 327;
Seeman v. Bandler, 56 N. Y. S. 210.

No authority holds that matter of estoppel is essential to render an election or a waiver effective. No detriment to or change of position by the opposite party is necessary to support either. The rule as to election and waiver goes to the conscience of the party with respect to the assertion of his rights. If the opposite party suffers detriment his position is of course that much stronger; but then the question of election or waiver is merged in the broader one of estoppel.

16 Cyc. 152, 805;
20 C. J. 4.

But Dunfee has suffered detriment, to wit: his expenditures and labor incurred in being brought in here as a formal and possibly a necessary party in this suit against the purchaser:

Bigelow says:

> "Where a party has given notice of appeal by mistake to a particular court, when the appeal should have been made to another court, and has discovered his mistake *before any step has been taken* by others in consequence, he may at will correct himself; but *only* (at will) upon the footing that *no prejudice* is done to others."
>
> Estoppel, 6th Ed., p. 790.

> "It matters not, if the party acting upon the representation was justified in so doing, *how* (the author's italics) he has changed his position, whether by * * * *the expenditure of money in litigation,* or, it is held, even by being induced to refrain from steps which would otherwise probably have been taken."
>
> *Id.,* p. 696.

Judge Cooley said in a Michigan case:

> "Expenditure in litigation may as reasonably constitute the basis of an estoppel as any other expenditure."
>
> Meister v. Birney, 24 Mich. 435.

See also:

> Myers v. Byars (Ala.), 12 So. 430.

And surely subjecting Dunfee to a liability to the purchaser is a detriment. It is a more onerous liability than that to the corporation, because the value of Dun-

fee's services in opening up the mine and making the sale could not have been set off against it.

Any suggestion that the defense of election should have been pleaded is met by the New York cases above cited, but more emphatically, in the present case, by the fact that the election is established by plaintiff's own pleading. The point was raised as soon as it could be raised, to wit: immediately upon the entry of the order of dismissal as to the purchaser, by motion to dismiss as to Dunfee, and was persisted in whenever opportune throughout the trial.

IV.

No Fiduciary Relation Existed Between Dunfee and the Corporation After the Expiration of the Lease, nor Did He Violate the Relation If It Did Exist.

[Spec. 1, Tr. p. 48; 4, p. 49; 5, p. 50.]

The lease was originally Dunfee's. It was his investment in the enterprise and contribution to the assets of the corporation. He turned it over to the corporation with the implied if not express understanding that the corporation would function and protect it.

If the corporation owed Dunfee no duty, Dunfee owed it no duty. If it owed Dunfee a duty and deliberately violated it, we fail to see how it has any standing in a court of equity, even admitting that Dunfee failed in his duty.

Said the New York Supreme Court:

> "The being president of an insolvent corporation cannot prevent him from doing what that company

has lost all ability to do. Where the company has virtually ceased to exist, and its powers have been taken away, I think the reason and the policy of the rule cease also—because no duty rested upon the agent to run the line for the company after the authority and ability of the company to do so had terminated."

Murray v. Vanderbilt, 39 Barb. 141 (157).

The syllabus of a Texas case follows:

"The fact that H. was director and general manager of a company which held a lease from M. conditioned to become void if a paying quarry was not established on the land in two years did not require him, though knowing M. intended to forfeit the lease for nonperformance of the lease, to inform others interested in the company of said fact, or prevent him, on the forfeiture being declared, from individually taking a new lease free of any interest therein of such others, so long as the failure to develop the quarry was due to no fault of his, but only to the company's inability to finance it."

The court said:

" * * * When Hall has exercised ordinary care in an endeavor to develop and establish the quarry contemplated by the contract, and failed through no fault of his own, but only on account of the company's inability to finance it, and the lease was thereby forfeited, his obligation to the company ceased.

"Because he was director and general manager, the law did not impose upon him the burden to personally undertake to carry out the contract of the company, but only demanded that he exercise

ordinary care, and in good faith attempt to carry out the duties imposed by the trust."

Green v. Hall (Tex.), 228 S. W. 183.

The Missouri Supreme Court said:

"It is true, directors of a corporation occupy a position of trust, and their dealings with the subject-matter of the trust will be watched with a jealous eye by the courts. Here it required $10,000 cash to make the purchase under the stipulation in the lease. The company did not have that amount of money, nor did it have the credit to raise so large a sum. The option was of no value to the company. Though we treat Mr. Butler as still being the president and a director of the corporation, still he certainly had a right to buy the reversion in the property upon which the corporation held the leasehold interest, unless the purchase deprived the corporation of some rights. As the corporation could not avail itself of this option to purchase the property, there can be no valid objection to the purchase of it by him."

Hannery v. Theatre Co. (Mo.), 19 S. W. 82 (84).

In the case at bar not only was the company not financially in a position to take a new lease, but, to the extent that Terwilliger represented it, it was refusing to put itself in such a position except upon a condition with which Dunfee did not have to comply, and to comply with which would have been a fraud upon the other stockholders.

Stockholders failing to interest themselves when money is required, may not complain if an officer buys for his own benefit.

Tevis v. Hammersmith, 84 N. E. 337.

See also:

4 Fletch. Enc. Corp., pp. 3534, 3554;
Stanton v. Gilpin (Wash.), 80 Pac. 290.

V.

Both as a Measure of Rescission and as a Measure of Salvage, Dunfee Had a Right to Take a New Lease in His Own Name.

[Spec. 6 and 7, Tr. p. 50.]

Can there be any manner of doubt that Dunfee could have rescinded the pre-incorporation agreement as against Terwilliger?

The bill of complaint declares that this agreement was made "for the use and benefit of the said Orleans Mining & Milling Co." [p. 4.]

Is there any manner of doubt, therefore, that Dunfee could have rescinded the agreement as to the corporation?

Had he done so, the original lease would have been restored to him.

But the principle is freely recognized that a fiduciary whose investment is being jeopardized may protect himself as Dunfee did in this case. The cases cited under the last caption recognize the principle. This is the underlying principle in Smith v. Lansing, 22 N. Y. 520 (526). See also 4 Fletch. Enc. Corp., p. 3540. In a

case spoken of "leading" certain directors advanced money to rescue the corporation from hopeless embarrassment, taking a mortgage as security. They afterwards bought the property in at execution sale, reorganized the corporation, and put it on its feet. Thereupon stockholders who had stood aloof desired to participate, but they were not permitted to do so.

> Twin Lick Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328.

VI.

There Is No Evidence Whatever That the Corporation Had an Expectancy of a Renewal of Its Lease, But Overwhelming Evidence That It Had No Expectancy.

[Spec. 8 and 9, p. 51.]

It should be observed that, while a fiduciary who handles trust property for his own benefit, has the burden of showing that he acted fairly, he never has the burden of showing that he was a fiduciary or that the property that he handled was trust property.

> "A constructive trust cannot be established by a mere preponderance of the evidence, but must be established by evidence which is clear, definite, unequivocal and satisfactory."
>
> 39 Cyc. 192.

Of course, if Dunfee had a right to retake the leased premises as a measure of rescission or salvage, then he did not take them as a trustee, there was no trust property, and there were no parties to any trust. Having special reference to lease extensions, Pomeroy says:

"The rule applies under every variety of circumstances, provided the rights of the other parties are still subsisting at the time when the renewal lease is obtained."

3 Pom. Eq. Jur., 4th Ed., Sec. 1050.

The expectancy that equity protects must be a "reasonable one," and it is only "under some circumstances" that such expectancy is "recognized as a valuable property right."

Lagarde v. Stone Co. (Ala.), 28 So. 199.

The expiration of the lease negatives the survival of any desire or expectancy.

Green v. Hall (Tex.), 228 S. W. 183.

More than a bare acquirement of the lease must be shown, to wit: a betrayal of trust.

Steinbeck v. Mg. Co., 152 Fed. 333 (338).

The rule ceases to operate when such expectancy no longer exists.

Crittenden etc. Co. v. Cowler, 72 N. Y. S. 701.

"The doctrine seems to be applied in those cases where the court can see that, in enforcing the trust relation * * * it is doing no injury to the interests of the landlord."

Jacksonville v. (Fla.), 43 So. 523.

VII.

The Court Erroneously Found Defendant Dunfee Guilty of Actual Fraud.

[Spec. 13, Tr. p. 53.]

The allegation of actual fraud is contained in paragraph IX of the bill of complaint.

The learned judge in his formal findings found:

"That the cash consideration agreed to be paid by said Orleans Hornsilver Mining Company to said defendant Dunfee for the assignment mentioned in paragraph IX of said complaint, was forty thousand dollars and not fifty thousand dollars as therein alleged; that prior to said assignment the said Orleans Hornsilver Mining Company had no knowledge or notice of the acts charged against the defendant Dunfee by the plaintiff and that, save as above modified, the allegations of paragraph IX of plaintiff's complaint are true." [p. 346.]

True, findings have no place in a suit in equity, but what weight did the court give to this utterly unwarranted finding, in coming to its conclusions?

VIII.

The Court Erred in Not Unconditionally Admitting Evidence Tending to Purge Dunfee of Actual Fraud.

[Spec. 22, Tr. p. 61.]

Dunfee was asked: "When you took this lease of June 5, 1920, what did you think as to whether or not Mr. Terwilliger had abandoned the enterprise?"

The court admitted the answer, "Yes, I certainly thought they had abandoned it," subject to counsel's objection of incompetency, etc. [p. 62.]

We are not aware of the standing of an answer admitted "subject to objection." Dunfee was entitled to an unqualified admission of this answer. That the ruling was prejudicial appears from the court's finding as to actual fraud.

X.

The Court Erred in Admitting in Evidence Against Dunfee Conversations Had by Mr. and Mrs. Terwilliger With Edwards Not in Dunfee's Presence.

[Spec. 16a, Tr. p. 55; 18, p. 56; 12, p. 53.]

The court stated in its opinion, in direct contradiction of the pleadings and all of the evidence, that "the mine was self-sustaining." [p. 35.]

No evidence is cited in support of this statement, for the simple reason that there is no evidence in support of it. It is a remote possibility, however, that the statement is based on the evidence of the Terwilligers to the effect that Edwards said that "the amount of work that had been done in excess of the amount of work that was called for in that lease * * * would apply on the future extensions." [p. 98.]

But for Dunfee to have been bound by this statement he must have authorized it, or been present at its making, or ratified it. These foundations were all lacking, and in view of the court's finding as to actual fraud we submit that the admission of the statement was prejudicial error.

XI.

The Court Erred in Finding That the "Mine Showing Continued to Improve So That in March, 1920, the Prospect for a Large and Paying Mine Was Much More Favorable Than Previously, All of Which Was Well Known to and Understood by Said Defendant, Dunfee," and That "the Mine Was Self-Sustaining."

[Spec. 11, Tr. p. 52; 12, p. 53.]

The first foregoing quotation is from paragraph VIII of the bill of complaint, which by paragraph I of the court's formal findings is found to be "true." [p. 345.]

Both matters quoted are so contrary to the evidence as to suggest that the learned judge did not carefully observe the effect of his blanket findings; but it is certainly possible that it was on the finding that the mine was improving that he found that the mine was self-sustaining, and that on these two findings he found that Dunfee was not justified in taking a new lease in his own name. Moreover, these two findings may account for the court's affirmative finding on the issue of actual fraud.

Surely, therefore, these utterly unjustifiable findings are prejudicially erroneous.

XII.

There Was a Fatal Variance in the Proof. The Court Erred in Permitting an Amendment to Cure the Variance, and in Admitting Evidence Under the Amendment.

[Spec. 3, Tr. p. 48; 19 and 20, pp. 58, 60.]

The cause of action is based on a lease dated June 5, 1920. The amendment permitted a shifting to a lease dated January 21, 1921.

There was no evidence to justify this shift.

XIII.

Terwilliger Was Guilty of Gross, Unconscionable and Unexplained Laches Both Before and After the Lease Expired.

[Spec. 10, Tr. p. 52.]

The books do not afford a parallel of Terwilliger's laches. Indeed, the term laches is not appropriate. Terwilliger deliberately and purposely laid in wait. His denial of notice is nothing short of an insult to intelligence.

> "The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence, the tendency of courts in recent years has been to hold the plaintiff to rigid compliance with the law, which demands not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of the facts."
>
> Foster v. R. Co., 146 U. S. 99.

He was bound to use available sources of information.

Taylor v. R. Co., 13 Fed. 152.

He must show why he remained in ignorance.

Hardt v. Heidweyer, 152 U. S. 546;

Godden v. Kimmell, 99 U. S. 201, 211.

A general allegation of ignorance is insufficient.

Wood v. Carpenter, 101 U. S. 135.

Failing to pay "any attention to the affairs of the company," is fatal.

Kissler v. Ensley Co., 141 Fed. 130.

His bill should show what prevented his earlier prosecution of his claim.

Badger v. Badger, 69 U. S. 87.

Especially is diligence required when the property is of a fluctuating nature.

Johnston v. Mg. Co., 148 U. S. 360;

Waterman v. Banks, 144 U. S. 394;

4 Pom. Eq. Jur., 4th Ed., Sec. 1444, p. 3427;

Kessler v. Ensley Co., 141 Fed. 130.

The judgment must necessarily be reformed as to amount and so as to run to the Orleans Mining & Milling Co., and so as to provide for Dunfee's reimbursement and compensation, but we respectfully submit that it should be wholly reversed, and the lower court directed to enter judgment for defendant and appellant.

Respectfully submitted,

AUGUSTUS TILDEN,

JOHN F. KUNZ,

Attorneys for Appellant.